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# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

**TURNER ELKHORN MINING COMPANY, ET AL.,**

*Appellants,*

vs.

**PETER J. BRENNAN, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,**

*Appellees.*

**On Appeal From The United States District Court For The Eastern District Of Kentucky**

## JURISDICTIONAL STATEMENT

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In The

# Supreme Court of the United States

October Term, 1974

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**No.**

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**TURNER ELKHORN MINING COMPANY, ET AL.,**

*Appellants,*

vs.

**PETER J. BRENNAN, SECRETARY OF LABOR, and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,**

*Appellees.*

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**On Appeal From The United States District Court For The Eastern District Of Kentucky**

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## JURISDICTIONAL STATEMENT

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Appellants appeal from Paragraph (3) of the judgment order of the United States District Court for the Eastern District of Kentucky entered on November 19, 1974, denying in part the injunctive and declaratory relief prayed for in Appellant's complaint. A copy of the Court's order is

reproduced herein as Appendix A. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

## OPINION BELOW

The Memorandum Opinion of the District Court for the Eastern District of Kentucky, Pikeville Division, is reported at 385 F. Supp. 424, and is reproduced herein as Appendix B.

## JURISDICTION

This action was brought under 28 U.S.C. §1331 to enjoin the implementation and enforcement of certain provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, on the ground that said Act of Congress is, in part, repugnant to the Constitution of the United States. Injunctive relief also was sought against the application and operation of certain administrative regulations promulgated under said Act. The action was heard and determined by a District Court of three judges under 28 U.S.C. §2284 as required by 28 U.S.C. §2282. The District Court's judgment granting in part and denying in part the permanent injunctive relief sought was entered on November 19, 1974, and notice of appeal (Appendix C hereto) was filed in that court on January 20, 1975. On January 16, 1975, the Secretaries of Labor and Health, Education and Welfare, appellees here-

in, filed notice of appeal to this Court from an order of the District Court entered on December 17, 1974 denying their motion to amend the District Court's judgment order. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Title 28, United States Code, Sections 1252, 1253 and 2101(b).

## QUESTIONS PRESENTED

1. Do the provisions of the Coal Mine Health and Safety Act requiring individual coal mine operators to pay benefits to their former employees (or their survivors) in connection with occupational disease incurred prior to enactment of the law constitute an arbitrary and irrational legislative means for providing economic relief to financially distressed inactive miners and their families, in violation of rights guaranteed Appellants by the Due Process Clause of the Fifth Amendment of the Constitution?

2. Has Congress violated rights guaranteed Appellants under the Due Process Clause of the Fifth Amendment of the Constitution by subjecting them to a statutory scheme of compensation for total disability due to occupational disease which, by virtue of arbitrary, over-inclusive legislative presumptions and eligibility criteria incorporated therein, will require coal mine employers to pay benefits to claimants who actually are disabled by nonwork-related diseases, and to claimants whose diseases may or may not be work-related, but who in any event, are not actually totally disabled at all?

## STATUTES INVOLVED

Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the relevant provisions of which are set out in Appendix D hereto.

## STATEMENT

Appellants are 22 coal mine operators who are subject to novel legal and economic burdens imposed by Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. §§901, *et seq.*, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150 (hereinafter "Title IV" or "The Act"). This action was instituted to enjoin the Secretaries of Labor and Health, Education and Welfare from enforcing this law against Appellants on the grounds that it is inconsistent with their rights under the Constitution and laws of the United States.

The legislation in question establishes a scheme of economic relief for former coal mining employees and their families that is completely without precedent or parallel in federal or state legislation. Title IV consists of three parts: Part A (§§401, 402; 30 USC 901, 902) contains a general statement of the purpose of the title, and defines certain terms used in the title. Part B (§§411-415; 30 USC

921-925) creates a program for the processing and payment out of federal revenues of claims for black lung benefits filed on or before December 31, 1973, and Part C (§§421-431; 30 USC 931-941) creates a program under which mine operators are responsible for the payment of benefits after December 31, 1973.

Congress intended Title IV to serve two different purposes: to provide benefits to a "significant" number of coal miners who were totally disabled by pneumoconiosis at the time of enactment of the law, and to the survivors of miners who had died of the disease prior to enactment; and to ensure that in the future adequate benefits would be available to miners and their families in the event of total disability or death due to the disease. Act §401; 30 USC 901. Congress has defined "total disability" for the purposes of the Act as having the meaning given it by regulations of the Secretary of HEW, ". . . except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." Act §402 (f); 30 USC 902 (f).

The two benefits programs created by Title IV do not coincide with its two separate purposes. The federally-financed Part B was not intended to, nor did it function to provide benefits in all cases of black lung disability or death that had arisen prior to enactment of the law, and the operator-funded Part C was not intended to, and in operation is not limited to miners now actively employed in mining activities who may become eligible in the future.

The distinction between the two benefits programs primarily is chronological.

The benefits program created by Part B of the Act is administered by the Secretary of the Department of Health, Education and Welfare through the Social Security Administration. Section 411, 30 USC 921, directs the Secretary to "make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis", and sets out certain presumptions concerning the existence of the disease and its causation which the Secretary is required to apply in determining a claimant's entitlement to benefits.

In the case of a miner who was employed in one or more coal mines for ten years or more and suffers or suffered from pneumoconiosis, it will be presumed that he developed the disease as a result of such employment; in the case of a deceased miner who was so employed and who died of a respirable disease, it will be presumed that he died due to pneumoconiosis; and in the case of a miner who was employed in an underground coal mine (or on the surface under similar conditions) and who suffers or suffered from totally disabling respiratory or pulmonary impairment, it will be presumed that he is totally disabled by pneumoconiosis, or that he died of it, or was totally disabled by it when he died.

Part C of the Act was designed to handle only those claims filed after the termination of the Part B program

and before December 31, 1981[1] by persons who are not entitled to benefits under the workmen's compensation law of a state formally recognized by the Secretary of Labor as affording coverage equivalent in scope to that of the federal law. Act §421(a); 30 USC 931(a). No State's compensation law has qualified for such official recognition by the Secretary of Labor, and there is little prospect that any state will so qualify. Part C, therefore, constitutes, for all practical purposes, a single-disease, single-industry, federal workmen's compensation statute.

As under Part B, claimants may be found eligible for benefits under Part C even if the disability or death upon which the claim is based occurred before enactment of the law, and even if the miner was not employed in mining at the time. The only limitation is that claims must be filed within three years of discovery of total disability due to pneumoconiosis, or of the date of death. Act §422(f)(1); 30 USC 932(f)(1). This means, for example, that men who have not worked in the mines since before the Second World War could be eligible for benefits under Part C, even taking into account the 3-year filing limitation. Under the definitions, standards and presumptions of this law, breathing impairments common to the aging non-mining popula-

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[1] Section 422(e); 30 USC 932(e) provides that "no payment of benefits shall be required under this section: . . . (2) for any period prior to January 1, 1974; or (3) for any period after twelve years after the date of enactment of this Act." While it would appear that the language of subparagraph (3) requires that all *benefit payments* terminate in 1981, Appellants understand that the Secretary of Labor interprets the language to mean that no new claims will be considered after that date, but benefits awarded on claims filed prior to that date will be payable for the life-time of the recipient or recipients. Legislative history does not resolve the ambiguity in this language.

tion which are not *medically* identifiable as coal workers' pneumoconiosis, and not in fact totally disabling would be *legally* considered to be both for purposes of awarding benefits. The resulting tendency of the law to award benefits to persons with respiratory ailments of any nature simply because they have a mine work history is one of the principal points of contention in this suit.

With minor exceptions, the Part B definitions, standards and presumptions governing the determination of whether a miner has or had pneumoconiosis and is or was "totally disabled" by it, also govern such determinations under Part C. The present discounted value of a Part C claim is estimated to be over $68,500.[2]

Immediately prior to the original enactment of the Coal Mine Health and Safety Act in 1969, congressional proponents of the Black Lung Benefits title of the Act estimated that there were approximately 50,000 retired and disabled miners and 3,300 active miners who could qualify for benefits upon enactment, and that the cost of the program could be no more than $120 million per year.[3]

In May of 1972, Title IV was amended to extend by 18 months the time within which claims for federal lifetime benefits could be filed, the claimant's burden of proving his claim was eased by adoption of a liberalized

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[2] Affidavit of J. Huell Briscoe, actuary, submitted in support of Appellants' Motion for Summary Judgment filed in the District Court February 15, 1974.

[3] House Comm. on Education and Labor, 91st Cong. 2d Sess., *Legislative History Federal Coal Mine Health and Safety Act* 1114, 1078, 1148 (Comm. Print 1970) (Hereinafter cited as "*1969 Legislative History*").

definition of total disability, medical proof requirements were drastically relaxed, surface miners were brought within the Title, additional dependents and survivors were made eligible, and the Social Security Administration was ordered to reconsider most of the claims it previously had denied on the basis of the stricter eligibility criteria.

At the close of the Part B program on June 30, 1973, some 295,000 claims had been allowed (175,000 miners; 120,000 widows and other survivors) and about 145,000 were pending. The Department of Health, Education and Welfare projected a cumulative benefits outlay of $2.7 billion by the end of fiscal year 1974. The recurring outlay was expected to be $74 million per month by that date[4]—a *monthly* cost approaching the annual cost projected four years previously.

On July 1, 1973, the Department of Labor began entertaining claims for which mine operators could be held liable. On July 11, 1973, the Department of Labor estimated in Senate budget hearings that 40,000 claims would be received in fiscal year 1974, that approximately 32,000 (or 80%) of them would be approved, and that 50% of those approved would be found to be the responsibility of mine

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4 These figures are contained in the Statement of Stephen Kurzman, Assistant Secretary for Legislation, Dep't. of Health, Education & Welfare, before the House General Subcomm. on Labor, of the Comm. on Education and Labor, presented July 17, 1973. (pp. 7-8).

operators.[5] As of February 14, 1975, 59,300 claims had been filed.[6]

In August of 1973, the mine operator Appellants filed suit to enjoin the implementation and enforcement of the Part C program on four grounds. First, that imposing liability on them to pay benefits to former employees or their survivors in connection with occupational disease incurred prior to enactment of the law violates their rights to due process and equal protection of law. Second, that the period-of-employment presumptions set out in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC 921 (c), are unconstitutionally arbitrary and irrational bases upon which to predicate coal mine operators' liability to pay benefits. Third, that regulations promulgated by the Secretary of Labor governing the determination of the particular employer to be held liable on a particular claim embodied arbitrary and irrational irrebutable presumptions which violate the employer's right to due process of law. And, fourth, that regulations of the Department of Labor imposing liability on coal mine operators to pay medical benefits to claimants already receiving federally financed

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[5] Senate Committee on Appropriations, 93rd Cong., 1st Sess. (1973) *Hearings on Fiscal Year 1974 Appropriations for The Departments of Labor, Health, Education and Welfare, and Related Agencies 2695.*

[6] Bureau of National Affairs, Daily Labor Report, Full Text Section, *Labor Department Statement on Black Lung Bill (H.R. 8) Before House Labor Subcommittee on Labor Standards*, p. G-1 (March 6, 1975). According to this statement, 54,350 of these claims were in process in the Department of Labor. Preliminary determinations concerning eligibility had been made in 33.9 per cent of these filings. Initial determinations favorable to the claimant on the medical evidence submitted were made in 21.9 per cent of the cases.

indemnity benefits under the Part B program are not authorized by the Act.

In February, 1974, Appellants filed a motion for summary judgment supported by answers to interrogatories, responses to requests for admission of facts, depositions, affidavits of a medical expert and an actuarial expert, and documents produced by the Labor Department. The Government filed a motion to strike all of the evidence submitted in support of the summary judgment motion, a motion to dismiss the action, and a cross-motion for summary judgment, which was not supported by any evidentiary matter.

In its decision of November 19, 1974, the three-judge District Court held as to Appellants' first claim, that ". . . the decision of Congress to impose [liability on operators] on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution." (App. B, p. 6b). The Court also upheld the constitutionality of the period-of-employment presumptions in Clauses (1), (2) and (4) of Section 411(c) of the Act, 30 USC 921(c), apparently on the grounds that the presumptions were rational and capable of being rebutted. (App. B, pp. 9b-10b). The Court did, however, find the presumption governing determination of total disability set out in Clause (3) of Section 411(c), 30 USC 921(c), and the limitation of rebuttal evidence in the last sentence of Clause (4) of Section 411(c), 30 USC 921(c), violative of mine operators' rights under the Due Process Clause of the Fifth Amendment (App. B, pp. 9b-11b), and enjoined the Secretary of Labor from applying them. (App. A, p. 1a).

The three-judge Court ruled that it had no jurisdiction to consider the issues raised concerning the validity of the Secretary's regulations and remanded those issues, and any others remaining, for decision by the District Judge who requested convocation of the three-judge panel. (App. A, p. 1a; App. B, pp. 1b, 13b).

## THE QUESTIONS ARE SUBSTANTIAL

The statute in question represents a unique congressional experiment in the use of workmen's compensation mechanisms as a means to achieve legislative ends alien to the limited purposes such laws rationally and constitutionally can serve. The employer liability provisions of Title IV are unique in two respects: they are used as a vehicle for providing economic relief in the nature of reparations to persons who had left the work force prior to enactment of the law, and the eligibility for benefits of former and present employees is dictated substantially by statutory presumptions and other eligibility criteria governing the determination of disability due to occupational disease which make the law over-inclusive and lend it the character of a pension law, not a workmen's compensation law. In each of these respects the law seriously implicates Appellants' rights under the Constitution.

1. The issue in this case is not whether it is permissible for Congress to create a program of financial relief for physically and economically disabled inactive coal miners and their families. Appellants recognize that to be a legitimate object of the federal legislative power. The question here is whether Congress has chosen an unconstitutionally arbitrary and unfair means to accomplish that end in singling out individual mine operators to finance this relief

on the basis of past employment relationships—many of which ended years, or even decades, prior to passage of the law.

The Constitution's guarantee against arbitrary, irrational or unfairly discriminatory legislative acts, whether founded on principles of due process or equal protection of law, extends not only to legislative ends, but to the means by which those ends are achieved. See *James* v. *Strange,* 407 U.S. 128, 141 (1972); *Reed* v. *Reed,* 404 U.S. 71, 76 (1971); *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U.S. 405, 413 (1935); Gunther, *The Supreme Court/1971 Term/ Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv.L. Rev. 1, 23 (1972). These principles are applicable to federal legislation through the Due Process Clause of the Fifth Amendment. *Weinberger* v. *Wiesenfeld,* ..... U.S. ....., 43 U.S.L.Wk. 4393, 4394 fn. 2 (March 19, 1975). Recent decisions of this Court suggest that the means by which legislative purposes are achieved should be made the subject of a meaningful judicial scrutiny when challenged as violative of these principles, even though the legislation may not touch upon "fundamental" interests, or involve constitutionally "suspect" classifications. See *Weinberger* v. *Wiesenfeld,* ..... U.S. ....., 43 U.S.L.Wk. 4393, 4397-99 (March 19, 1975); *James* v. *Strange,* 407 U.S. 128, 134, 141 (1972); *Reed* v. *Reed,* 404 U.S. 71, 76 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438, 448 (1972); *Weber* v. *Aetna Cas. & Surety Co.,* 406 U.S. 164, 170 (1972); *Cleveland Bd. of Education* v. *LaFleur,* 414 U.S. 632, 655 (1974) (Concurring Opinion of Powell, J.); *Frontiero* v. *Richardson,* 411 U.S. 677, 691 (1973) (Concurring Opinion of Powell, J., Burger C.J. and Blackmun, J.) *City of New York* v. *Richardson,* 473 F.2d 923, 930-31 (2d Cir. 1973); *Samuel* v. *Univer-*

*sity of Pittsburgh,* 375 F.Supp. 1119, 1132-34 (W.D. Pa. 1974).

Legislation that attaches new legal rights and duties to pre-enactment transactions, occurrences and conduct, as the legislation in question here does, long has been recognized as constitutionally suspect because of its great potential for violating the guarantee of fundamental fairness inherent in the Due Process Clauses of the Fifth and Fourteenth Amendments, see generally: *Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330, 350 (1935); *Nichols* v. *Coolidge,* 274 U.S. 531, 542 (1927); *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, 554 (1949) (*dictum*); *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 315-16 (1945) (*dictum*); *Mora* v. *Mejias,* 223 F.2d 814, 816, 819 (1st Cir. 1955); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking,* 48 Calif. L. Rev. 216, 221-225 (1960); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv.L.Rev. 692 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence,* 20 Minn.L.Rev. 775, 782, 791 (1936), and consequently, should be subjected to a scrutiny more careful than that demanded in the case of constitutional challenges to laws affecting economic interests, but not sharing that characteristic.

A proper examination of the relationship between the purposes of the legislation in question and the means devised by Congress to achieve those purposes would reveal the error of the District Court's holding that the operator-liability provisions of Title IV represent a rational exercise of lawful congressional powers. (App. B, p. 6b). The constitutional vice of the black lung benefits law is that Congress has attempted to employ traditional workmen's compensation concepts and mechanisms to accomplish two

very different ends: (1) to insure that men working in coal mines now and in the future will be compensated if they become disabled by coal workers' pneumoconiosis, and (2) to provide economic relief for large numbers of financially distressed ex-miners (and their families or survivors) who worked in coal mines in years past and did not have the benefit of workmen's compensation coverage of this nature. The first is an appropriate subject for compensation law, but the second is not.

The early legislative history of Title IV clearly reflects a congressional belief that economic relief should be provided out of federal revenues for aging and disabled inactive mine workers and their families as a matter of national moral obligation.[7] The workmen's compensation

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[7] *1969 Legislative History*, Note 3, *supra*, at 256-57; 328; 338-39; 346; 569-71; 654; 719-20. For example, Senator Javits said (pp. 338-39):

> . . . [T]he entire Nation shares the responsibility for this tragic situation; witness after witness who testified on this bill stressed America's complete insensitivity to the problem of black lung until very recently—it was not until the mid-1950's that black lung was recognized by responsible medical authorities as a disease.

and Representative Perkins said (p. 654):

> The coal produced by these victims of black lung was sold throughout the United States at prices lower than it could have been if compensation costs had been paid at the time that the disability was incurred. Consequently, compensation for past damage to a coal miner's health can, we believe, logically be considered a national responsibility.

and Representative Dent said (pp. 719-20):

> The miners for whom this program is intended became victims of pneumoconiosis many years ago. They were mining coal for national consumption, and for an industry under intense Federal pressure to keep the cost of the fuel low. The entire Nation benefited from the use of coal and its low cost. The entire Nation then, has an obligation to the miners who became the unfortunate recipients of an insidious disease in the process, and to their widows and minor children.

provisions imposing liability on mine operators were added to the law on the eve of its enactment, virtually without congressional deliberation, and encompassed inactive, former mine workers as well as those presently in the work force.[8] Legislative history leaves no doubt that the provisions of Title IV granting benefits to inactive miners and their families are a reparations measure to secure for these persons present legal redress for harm suffered in the past that was not compensable at the time, but in hindsight is deemed to have been socially or morally reprehensible. In this respect, the law embodies the philosophy expressed in proposals for payment of reparations to Japanese Americans, American Indians and Black Americans.[9] Congress rationally might have chosen as its means to finance these reparations to impose that entire burden directly on the public, as it partially did in Part B of Title IV, or to impose it indirectly on the consumers of coal through a uniform exaction from the industry on the basis of size of payroll or production, which equitably could be passed on to consumers through pricing. Instead, Congress chose as its means the profoundly arbitrary and irrational scheme found in Part C of Title IV of imposing this economic burden on the former employers of inactive mine workers through the vehicle of a workmen's compensation law.

The provisions of Part C of Title IV imposing liability on a mine operator to pay benefits to his former employees

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[8] *1969 Legislative History*, Note 3, *supra*, at 1059-61, ff.

[9] See, *e.g.*, Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 533 (1945); *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F.Supp. 265, 269, 272-73 (U.S.C.C. 1955) (discussing the purposes and policies underlying the Indian Claims Commission Act); Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. Rev. 1063 (1968).

cannot seriously be defended as means of exacting reparations from the operator on the basis of his own past misconduct. To be so justified in the face of the requirements of due process of law, they would have to impose their burden on the blameworthy alone. Under Title IV, however, a mine operator is not singled out to bear the responsibility for paying benefits to any particular inactive miner-claimant (or claiming survivor) on the basis of evidence of irresponsible mining activity in the past, or evidence that he knowingly exposed his employees to hazards and failed to take heed of their need for protection, or any other considerations going to the question of the culpability of his past conduct.

Viewed as a legislative means for spreading these costs to the industry and eventually to the consumers of coal, these provisions are equally indefensible. The underlying philosophy of workmen's compensation laws is that economic losses suffered by workers as a result of disabling disease and injury incurred in connection with their labor should be borne by the consumers of the products whose production was the occasion for their losses. Workmen's compensation laws achieve this result by transferring the loss from the worker to his employer, who is better capable of passing the loss on to consumers through the price of the product, along with his other costs of production.[10]

Shifting the initial incidence of these losses to employers as a cost of production brings market forces to bear on

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[10] *See generally*: 1 Larson's Workmen's Compensation Law §2.20; Prosser, *Law of Torts* 530-31 (4th Ed. 1971); Riesenfeld, *Modern Social Legislation* 137-140 (1950); National Comm'n on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation* 21-25 (1973).

relative economic efficiencies, which provides a powerful incentive for an employer to protect his employees against occupational hazards, because producers facing higher costs and lower profits due to poor safety records are competitively disadvantaged.[11] A producer's compensation costs are a function of both the degree of hazard to which his employees are exposed and the numbers of them so exposed. Assuming that a producer's use of labor is economically efficient, and that through health and safety measures he has minimized the risk of employee injuries, then his compensation costs should rise and fall along with his level of production and, consequently his revenues. In the instant case, however, Congress has chosen these mechanisms as the means by which the costs of providing benefits to inactive miners will be imposed upon mine operators just as if these costs arose out of losses incurred in connection with current mine production. Put to this use, compensation mechanisms cease to function rationally and become an arbitrary economic force.

If a mine operator has been in business longer than his competitor, or in the past has engaged in mining on a larger scale and employed greater numbers of mine workers than at present, or does business in an area where there is no alternative employment for his former employees,[12] he could be faced with a potential claims liability completely disproportionate to the number of miners he currently em-

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[11] See The Report of the National Commission on State Workmen's Compensation Laws 38, 39, 87 (1972).

[12] Under Title IV, inactive miners who are capable of working nevertheless are considered "totally disabled" and eligible for benefits if they cannot find coal mining employment or nonmining employment suitable to their age, education and experience in the immediate area of their residence. Act §402(f); 30 USC 902(f).

ploys—indeed, he could have more claims than he has employees. There is no way this operator can avert this potential liability through exercise of choice or modification of his conduct, as he is capable of doing in the case of his present work force. His competitor, unburdened by this liability, has the distinct advantage, even though both operators may employ the same number of miners in equally efficient and equally safe mining activities.

Since workmen's compensation insurance rates are established on a state-to-state basis, these same forces can operate with an equal vengeance on the entire mining industry of a state. In a state where mining has been a major factor in the state's economy for many years and which now numbers among its population a great many former miners who cannot find suitable nonmining employment, mine operators will be confronted with compensation costs much higher than those of competing operators in states where mining is a new industry, even though the two states' industries may be competitive when measured in terms of the cost-efficiency of current production. There is no justification for Congress having chosen a scheme for the economic relief of inactive miners that results in such arbitrary discriminations among competing mine operators otherwise similarly situated.

Title IV represents a radical and constitutionally suspect departure from traditional compensation theory. The theory of private reparations financing embodied in the law could become precedent for almost infinite permutations in legislative classification—of both those to bear the burden and those to gain the benefits of such laws. To Appellants' knowledge, neither Congress nor any state legislature has ever enacted an employer-financed workmen's

compensation law that covered persons who had ceased to be workmen prior to the enactment of the law. Appellants are aware of only one federal legislative parallel to the inactive-miner provisions of Title IV, and that is a provision in the Railroad Retirement Act of 1934 requiring railroads to finance pensions for workers who had retired within a year before enactment of the law. That provision was declared unconstitutional by this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935)[13] on the ground that ". . . there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted." 295 U.S. at 354. The Due Process Clause of the Fifth Amendment should not be read to require any less in the way of legislative fairness today.

The court below erred in distinguishing *Alton* and upholding the statute on the basis that the liabilities it imposes sound in tort. (App. B, p. 5b). Actually, compensation laws represent a public superimposition of rights and duties on the employer-employee relationship in lieu of rights and duties sounding in tort, see *New York Central*

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[13] Appellants appreciate that the primary holding of the *Alton* case—that the Railroad Retirement Act as a whole was beyond Congress' powers under the Commerce Clause (Justices Roberts, Van Devanter, McReynolds, Sutherland and Butler for the majority; Chief Justice Hughes, and Justices Brandeis, Stone and Cardozo, dissenting)—has been severely criticized, along with many other decisions of that era, as representing a discredited judicial philosophy. But *Alton* was not a single issue case. Chief Justice Hughes, speaking for the four dissenters, agreed with the majority that the "retroactive" pension provision was ". . . arbitrary and beyond the power of Congress," 295 U.S. at 389, and Appellants are not aware that this unanimous view has lost its force.

*R.R. Co.* v. *White*, 243 U.S. 188, 203 (1917), and as such, should be considered no more or less quasi-contractual than a duty imposed by law to pay pensions to employees, and no less arbitrary when imposed after the employment relationship has ended.

2. The second major constitutional flaw in Title IV arises out of Congress' abandonment of the principle that workmen's compensation benefits ought to be paid only in connection with *work-related* disabilities. In the court below, Appellants contended that, notwithstanding its stated purposes, Title IV was over-inclusive as a matter of fact—that application of its provisions governing administrative determinations of compensable disease and disability[14] would, as a matter of fact, expose them to liability to persons who are not totally disabled at all, or who suffer from nonwork-related diseases common to the general population. These questions of fact were put at issue by Appellants' motion for summary judgment. The Secretary of Labor moved to strike all of Appellants' evidence on summary judgment as irrelevant, taking the position that the court was not permitted to consider such issues—that to do so would, in effect, invade the legislative prerogative. Although the District Court's holding is not expressly stated, its acceptance of the Secretary's position is clear from the sense of its opinion and the effect of its judgment. The District Court erred in refusing to undertake the factual inquiry required to rule on Appellants' motion for summary judgment.

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[14] The period-of-employment presumptions of §411(c); 30 USC 921(c); the diagnostic limitations of §413(b); 30 USC 923(b); the definition of total disability in §402(f); 30 USC 902.

Appellants' contention that Congress has created period-of-employment presumptions governing eligibility determinations that arbitrarily imbue cases of nonoccupational disease and disability with presumptive merit and hedged the claims determination process with medically invalid diagnostic limitations, demands factual resolution. This Court has said that statutory provisions that permit or compel inference of a fact from proof of another when there is no rational connection between the fact proved and the ultimate fact to be presumed therefrom, or that do not afford fair opportunity to rebut such presumptions even where a rational connection may exist, are forbidden by the Due Process clauses of the Fifth and Fourteenth Amendments because they amount to legislative arbitrariness. See, *e.g., Cleveland Bd. of Ed.* v. *LaFleur,* 414 U.S. 632, 644 (1974); *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, 514 (1973); *Vlandis* v. *Kline,* 412 U.S. 441, 446 (1973); *Stanley* v. *Illinois,* 405 U.S. 645, 657 (1972); *Leary* v. *United States,* 395 U.S. 6, 31 (1969); *Tot* v. *United States,* 319 U.S. 463, 467 (1943); *Heiner* v. *Donnan,* 285 U.S. 312, 325 (1932); *Schlesinger* v. *Wisconsin,* 270 U.S. 230, 239-40 (1926). See also, *Andrews* v. *Drew Mun. Sch. Dist.,* 507 F. 2d 611, 614 (5th Cir. 1975); *Owens* v. *Roberts,* 377 F.Supp. 45, 52 (M.D. Fla. 1974); *Juster Bros.* v. *Cristgau,* 7 N.W.2d 501, 507 (Minn. 1943); *Carolene Milk Products Co.* v. *McLaughlin,* 5 N.E.2d 447, 450 (Ill. 1936). The case of *Owens* v. *Roberts, supra,* is especially pertinent to this case, because it involved a statutory presumption that was termed rebuttable, but in fact had been rendered irrebuttable by regulations promulgated under the statute. See 377 F.Supp. at 49-50.

Congress may not, by legislative fiat, enact into existence facts that do not, and which cannot be made to, exist in

actuality. See *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932). Courts, therefore, must determine the rationality of a statutory presumption as a matter of fact. This Court has said in the *Leary* case, *supra,* that in determining the rationality of presumptions dealing with matters not within specialized judicial competence or not completely commonplace, significant weight should be accorded the capacity of Congress to "amass the stuff of actual experience and cull conclusions from it"; but that, since such determinations are "empirical", courts must consider all relevant direct and circumstantial data. 395 U.S. at 38. In the *Leary* case itself, for example, this Court undertook an examination of floor debates, committee reports, testimony given at committee hearings, written statements and documents submitted to the committees, published reports of federal and state agencies dealing with collateral matters, and even current periodicals and books, in order to resolve the factual rationality of a statutory presumption. See 395 U.S. at 39-40.

Appellants believe that there was sufficient evidence of that nature before the District Court to justify summary judgment in their behalf, or at least sufficient to show that a material issue of fact was in dispute which required resolution at trial. Although the District Court applied the law discussed above in striking down a presumption contained in Title IV that expressly was irrebuttable, it did not address itself to Appellants' contention that the rebuttable presumptions of Title IV were, in fact, not fairly rebuttable, or had been rendered effectively irrebuttable by other provisions of the law and the regulations mandated thereunder—issues upon which findings of fact and conclusions of law should have been made. (See App. B, pp. 6b-9b). If judicial inquiry into issues of fact such as those

raised by Appellants in this case is forbidden, then constitutional safeguards against arbitrary statutory presumptions and over-inclusive legislative definitions are illusory.

## CONCLUSION

For the reasons stated herein, it is submitted that the District Court failed to recognize and protect the constitutional rights of Appellants invaded by the legislation in question, that the questions raised by the lower court's decision are substantial and of public importance, and should be resolved by this Court.

Respectfully submitted,

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April, 1975

# APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1761

TURNER ELKHORN MINING COMPANY,
a Kentucky Corporation, ET AL,

*Plaintiffs,*

VS: ORDER

PETER J. BRENNAN, Secretary of the United States Department of Labor, an Agency of the Federal Government, and CASPAR W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, an Agency of the Federal Government,

*Defendants.*

In conformity with the Memorandum Opinion this date entered herein,

IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the irrebutable presumption set forth in 30 U.S.C. 921(c)(3) and the limitation of evidence necessary to rebut the presumption created in 30 U.S.C. 921(c)(4) are violative of the United States Constitution.

(2) That the Secretary of Labor shall no longer seek to apply the irrebuttable presumption made by 30 U.S.C. 921(c)(3) or to limit evidence in rebuttal to the presumption created in 30 U.S.C. 921(c)(4).

(3) That all other provisions of the Act which have been considered are permissible legislation under the Federal Constitution.

(4) That all matters raised in the pleadings which are outside the jurisdiction of the three judge court are retained for consideration by the requesting judge.

This the 19th day of November, 1974.

Entered By Direction Of The Court:
/s/ H. David Hermansdorfer, Judge

# APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 1761

TURNER ELKHORN MINING COMPANY,
a Kentucky Corporation, ET AL,

*Plaintiffs,*

VS: MEMORANDUM OPINION

PETER J. BRENNAN, Secretary of the United States Department of Labor, an Agency of the Federal Government, and CASPAR W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare, an Agency of the Federal Government,

*Defendants.*

Before: LIVELY, Circuit Judge, and MOYNAHAN and HERMANSDORFER, District Judges

This action constitutes a facial attack upon the constitutionality of portions of Subchapter IV, Black Lung Benefits, of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, Pub. L. 93-303, May 19, 1972, 86 Stat. 925, 30 U.S.C. 901 *et seq.* Plaintiffs are twenty-two (22) coal mine operators who charge the Act violates rights secured under the Fifth Amendment to the Federal Constitution. The defendants are the Sec-

retaries of the United States Departments of Labor and Health, Education and Welfare.

Jurisdiction is invoked and found under 28 U.S.C. 2282. Such jurisdiction is limited to a consideration of the Act and does not extend to a consideration of administrative regulations, *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171 (1939); *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (1966), cert. denied 385 U.S. 898 (1966), which are within the jurisdiction of a single judge court. Further, we consider only the facial attack made upon portions of the Act and not its implementation to any specific claim for benefits.

Perspective may be had in considering the questions presented by first noticing the general legislative plan incorporated in the Federal Coal Mine Health and Safety Act as amended. The Act is structured in terms of a preamble and five (5) major subchapters, each of which is devoted to a separate legislative concern. Our present efforts are concerned only with portions of Subchapter IV. This subchapter, denominated "Black Lung Benefits", is comprised of three (3) primary subdivisions entitled respectively "Part A—General Provisions"; "Part B—Claims for Benefits Filed On Or Before December 31, 1972"; and, "Part C—Claims for Benefits After December 31, 1972". Of these subdivisions our attention is directed to Parts B and C only.

Part B of Subchapter IV deals principally with benefits for total disability or death arising from pneumoconiosis which are to be determined and paid by the Federal Government. Eligibility and standards for processing claims are provided by sections 921 through 924. The final section in Part B, section 925, establishes a transition period,

June 30, 1973 to December 31, 1973, during which federal participation as payee of benefits is phased out and state administration of liability through workmen's compensation coverage with federally approved standards, 30 U.S.C. 931, or direct liability on coal mine operators, 30 U.S.C. 932, is assumed.

Part C directly deals with conditions under which the Secretary of Labor will certify state workmen's compensation laws as complying with federal standards, or, if such compliance is not found, imposition of liability on the coal mine operators. In the circumstances of direct liability upon a coal mine operator, the Act specifically recognizes the requirement of an employment nexus between the coal miner or those claiming in respect of a deceased coal miner and the particular coal mine operator against whom the claim is made. Pursuant to Part C, section 932(a), liability devolves to such operator "with respect to death or total disability due to pneumoconiosis *arising out of employment in such coal mine*"; and, under section 932(c), it is provided that there is *no liability* on such operator for benefits "*due to pneumoconiosis which did not arise, at least in part, out of employment in such mine during the period when it was operated by such operator*".[1] (Emphasis added)

Further, claims must be filed within the limitations period established by the Act. Under Part B a claim must be filed generally by December 31, 1973; the exceptions

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[1] This may include liability from a prior operator's business if such prior operator operated the coal mine on or after December 30, 1969, the effective date of the Act. The prior operator is not, however, relieved of liability by this provision. 30 U.S.C. 932(i)(2).

may result in an extension of six (6) months from December 31, 1973 under sections 922(a)(3), 924. Part C requires the claim to be filed within three (3) years of the discovery of total disability or of death from pneumoconiosis, section 931(b)(2)(D), except in the case of a living miner whose eligibility is established under section 921(c)(4) where the claim of miners engaged in coal mining for more than fifteen (15) years must be filed within three (3) years of the last exposure to disease employment, or in the event of death, within fifteen (15) years of the last exposure employment. 30 U.S.C. 932(f)(1)(2).

Argument is made that the statutory scheme outlined for assessing liability on the coal mine operator for those miners no longer in the work force is irrational and amounts to reparations in favor of the coal miners against the coal industry. The rational approach, argue plaintiffs, is the workmen's compensation approach where the risk of injury or disease is insured against during the employee's period of employment and the economic burden thereby incurred is spread to the public through the pricing mechanism. To impose what plaintiffs believe will be a severe economic burden on the coal industry for total disability or death arising from periods of employment of miners when the disease has not been recognized[2] and no methods of protecting the industry from that risk were taken, is argued as constitutionally impermissible. Plaintiffs cite a multi-issue railroad pension case, *Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), which held that a requirement for interstate carriers to pay a retirement allowance

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[2] There was testimony and information, eg. Senator Javits, to the effect that pneumoconiosis was not recognized in the United States until the mid-1950's. *1969 Legislative History 339.*

to persons who were in the service within one (1) year of the Act was arbitrary and unreasonable. Mr. Chief Justice Hughes and those justices joining him in dissent did, in fact, concur in the majority's holding on that particular question. 295 U.S. 389. We hold, however, that the *Alton* decision is distinguishable. There, any person who was employed within one (1) year of the date of the Act was to be awarded benefits even though such person may have been discharged for cause or severed employment for a reason incompatible with the imposition of implied *quasi-contract* responsibility to pay such allowance for retirement. The Court in *Alton* recognized a fundamental difference between compensation type laws which deal with existing rights and liabilities and the Act there under consideration which sought to impose "a new incident, without reference to any existing obligation or legal liability", upon the employer-employee relationships. 295 U.S. at 369-71. In the instant case the Act imposes liability upon a coal operator only if standards sounding in tort are met: (1) a claim is timely filed; (2) a prior employment nexus is established; (3) the claim is based on pneumoconiosis arising, at least in part, from such employment; and, (4) the coal miner has become totally disabled or has died from pneumoconiosis. Those factors not only distinguish *Alton, supra,* but manifest a logical and rational basis for the assertion of liability.

In assessing the argument against imposition of remote claims where the responsible party did not insure against that particular risk because it was unknown to the coal industry at large, we are not persuaded that fact makes the Act unreasonable. Clearly, plaintiffs have cited no binding or persuasive authority showing that such liability for remote claims violates safeguards of the Federal Constitu-

tion. This Court may not, under *U.S.* v. *Carolene Products Co.*, 304 U.S. 144, 145 (1938), superimpose its judgment on that of Congress:

> ". . . where the legislative judgment is drawn into question, [judicial inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. . . . As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."

We find that the manner in which liability is assessed is rational, and the decision of Congress to impose it on what may be called remote claims of those former miners no longer in the work force was an exercise of its lawful power under the Constitution.

The statutory manner of imposing and implementing such liability as the Act imposes upon coal mine operators under the Act presents a separate and distinct issue of several parts.

*First,* the Act identifies a particular disease which, when manifest in an advanced state in coal miners, may cause total disability or death. There is no doubt that the Congress elected to avoid precise medical terminology in defining pneumoconiosis, section 902(b):

> "The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine."

No meaningful argument has been presented challenging the power of Congress to make such definition after receiving conflicting medical evidence about the disease.[3] The

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[3] The committee reports abound with such conflict. A summary is presented in *U.S. Code, Cong. and Admin. News,* 92d Cong., Second Session, 1972, p. 2315.

naming of the disease or its components in this instance is of more academic than legal significance. *U.S.* v. *Carolene Products Co., supra.* We hold the definition is neither arbitrary nor unreasonable.

*Second,* under part B of the Act at section 921(c) there are four (4) statutory presumptions made in aid of a claimant's efforts to secure benefits. Plaintiffs have standing to attack these presumptions under section 925 where the Secretary's finding of liability during the transition are binding on the operators and, as to the last presumption, under section 932(f)(2), where it is specifically incorporated into Part C as a basis for benefit eligibility. The provisions of section 921(c) are:

> "For the purposes of this section—
>
> "(1) if a miner who is suffering or suffers from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;
>
> "(2) if a deceased miner was employed for ten years or more in one or more coal mines and died from a respiratory disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
>
> "(3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by either means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumo-

coniosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

"(4) if a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's . . . claim under this title, and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, or that at the time of this death he was totally disabled by pneumoconiosis. . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

Plaintiffs make the argument that the presumptions presented by statute are irrational and amount to de facto irrebuttable presumptions. In *Tot* v. *United States,* 319 U.S. 463 (1943), the Court, relying upon its decision in Mobile, *J. & K. C. R. Co.* v. *Turnipseed,* 219 U.S. 35 (1910), held that the controlling test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the facts presumed". 319 U.S. at 467. The Court wrote:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed." See *Leary* v. *United States,* 395 U.S. 6, 33 (1969).

The function of a rebuttable presumption is simply to shift the burden of proof. We do not doubt that Congress has the power to make such presumptions.

In the medical testimony received by the Congress there was no significant disparity as to the fact that exposure in a coal mine for a period of ten (10) years would typically present a medically identifiable case of advanced or complicated pneumoconiosis. Thus, a rebuttable presumption that after ten (10) years, as established in presumptions (1) and (2) of section 921(c), a coal miner has pneumoconiosis arising from his employment may be sustained; provided, that in the case of a coal miner with multiple employer experience of a period of ten (10) or more years, the presumption is not used as a basis for identifying one of such employers as being responsible under the Act. Such a determination involves fact questions which were not, or hardly could be, established before the Congress. Curiously, Congress did not legislate directly upon this critical selection process or establish standards for rule making, but rather, delegated the entire problem to the Secretary of Labor. 30 U.S.C. 932(h). There is no dispute that Congress has the power to make such a delegation. Accordingly, that delegation can only be deemed proper.

The irrebuttable presumption contained in section 921 (c)(3) not only involves a presumption of the existence of pneumoconiosis but forecloses all fact finding as to the effect of that disease upon a particular coal miner upon a clinical finding of the presence of a chronic dust disease of the lung of a coal miner. The pattern adopted in section 921(c)(3) is a departure from the overall pattern of the Act which makes the existence of both the disease and disability two (2) separate factors which must be established before liability is imposed. The statutory definition of total disability involves factual issues distinct from clinical findings. 30 U.S.C. 902(f):

> "The term 'total disability' has the meaning given it by the regulation of the Secretary of Health, Education and Welfare, except that such regulation shall provide that a miner shall be considered totally disabled *when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.* Such regulation shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act." (Emphasis supplied)

To the extent that such presumption purports to making a finding of total disability in terms other than those provided by the Act as standards for total disability, it is unreasonable and arbitrary. As written, section 921(c)(3) is violative of due process in precluding the opportunity to present evidence as to the effect of a chronic dust disease upon an individual in determining whether or not he is disabled. *Heiner* v. *Donnan,* 285 U.S. 312, 329 (1932); *Stanley* v. *Illinois,* 405 U.S. 645 (1973); *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

The final rebuttable presumption provided by section 921(c)(4) differs from all other statutory presumptions of section 921(c) in that it provides the standard "and, if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment", then the employment experience of fifteen (15) years together with such other evidence may be used to support a rebuttable presumption. In this construction "other evidence" of total disability would by traditional rules of statutory construction imply evidence of total disability within the meaning of the Act as opposed to a finding of total disability in every case solely upon clinical evidence of a chronic dust

disease. Given this construction the presumption contained in section 921(c)(4) passes constitutional muster. This presumption merely makes certain that a negative x-ray does not become conclusive evidence that there is no mine-related disability arising from pneumoconiosis.

*Third,* within the language of section 921(c)(4), but outside the enactment of the presumption itself, is the following:

> "The Secretary may rebut such presumption only by establishing (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

We declare this limitation upon evidence to rebut the presumption that such disability is due to pneumoconiosis established by section 921(c)(4) to be invalid as arbitrary and unreasonable. Congress has made no finding that pneumoconiosis *per se* is disabling. Quite to the contrary, Congress has recognized that the disease must produce total disability or death before any operator may be held liable for benefits. 30 U.S.C. 932. It has been judicially determined that pneumoconiosis, like any other disease, is not disabling per se. Cf. *Rose* v. *Cohen,* 406 F.2d 753 (6th Cir. 1969); *Hall* v. *Weinberger,* No. 1375 (E.D. Ky. 1973) *aff'd mem.* No. 73-1871 (6th Cir. 1974). Since, under section 925, the operator is bound by the Secretary's finding of liability under Part B, the operator may attack the application of this limitation. To require rebuttal evidence that a coal miner did not have pneumoconiosis is irrational where liability is not predicated on the mere presence of the disease, but rather on a complicated state of the disease.

Further, the liability established under section 932(c) specifically exonerates a coal operator of liability for ben-

efits "which did not arise, at least in part, out of employment in such mine during the period when it was operated by such operator". There is no rational basis upon which the burden of proving that the impairment "did not arise out of, or in connection with employment in a coal mine"[4] can be placed upon a specific potentially liable coal mine operator. Such operator must be found liable under the Act for his mine's involvement in the disease, if any.

*Fourth,* no basis is shown, and we can find none, upon which Congress may deprive a litigant of the right to produce whatever evidence may be admissible generally in attempting to rebut a presumption without offending due process.

We are persuaded that none of our holdings in this matter affect the facial constitutionality of the Act *per se.* Excising those matters found to be constitutionally offensive( we hold that the Act is left substantially unimpaired, and no essential part of the legislative plan has been at-

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[4] It has been suggested that as section 932(c) provides that no benefit is payable by any operator for death or total disability which did not arise, at least in part, out of employment in a mine during the period when it was operated by such an operator, then the presumption dealt with in section 921(c)(4) could be construed when applied to an operator's liability under Part C, to mean "employment in *its* coal mine" rather than "employment in *a* coal mine" as written. It is questionable whether this Court has the authority to so construe the plain language of an Act of Congress and, in this instance, declines to entertain the suggestion.

tacked successfully.[5] The Secretary shall no longer seek to apply the irrebuttable presumption made by section 921 (c)(3) or to limit evidence in rebuttal to the presumption created in section 921(c)(4). All other provisions of the Act which have been considered are hereby declared to be permissible legislation under the Federal Constitution.

All matters raised in the pleadings which are outside the jurisdiction of this Court are retained for consideration by the requesting judge.

An order in conformity with this Memorandum Opinion shall be entered forthwith.

This the 19th day of November, 1974.

Entered By Direction Of The Court:
/s/ H. David Hermansdorfer, Judge

---

[5] We note that a similar but in part distinguishable case involving the Act and regulations is *National Independent Coal Operator's Association* v. *Brennan*, 372 F.Supp. 16 (D. D.C. 1974), affirmed without opinion, .... U.S. ...., No. 73-1902, October 29, 1974. The opinion of the District of Columbia Court does not touch directly the matters found constitutionally objectionable in the instant case. The closest point of convergence is found in the *Brennan* decision's Conclusions of Law (v), 372 F.Supp. at 24:

> "Pursuant to Sections 422(h) and 422(f)(2) of the Act, the Secretary of Labor properly promulgated regulations applying the Section 411 presumptions to Section 422 operator liability. Therefore, the *statutory provisions pursuant to which the Secretary's regulations were promulgated* do not and will not deprive the plaintiffs in No. 1711-73 of their property without due process of law or deny them equal protection of the law." (Emphasis added.)

This conclusion holds that sections 422(h) and (f)(2) are valid. It does not consider the validity of section 411(c) of the Act. Our consideration of these issues, therefore, is not precluded nor are the issues mooted by the decision of the Supreme Court.

# APPENDIX C

In The
UNITED STATES DISTRICT COURT
For the Eastern District tof
Kentucky at Pikeville

CIVIL ACTION NO. 1761

TURNER ELKHORN MINING COMPANY, et al.,

*Plaintiffs,*

*vs.*

PETER J. BRENNAN, Secretary of the United States Department of Labor, and CASPAS W. WEINBERGER, Secretary of the United States Department of Health, Education and Welfare,

*Defendants.*

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Turner Elkhorn Mining Company, et al, plaintiffs herein, hereby appeal to the Supreme Court of the United States from Paragraph (3) of the Judgment Order entered in this action on November 19, 1974.

This appeal is taken pursuant to 28 U.S.C. § 1253.

R. R. McMahan
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135 S. LaSalle Street
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Louisville, Kentucky 40202

By /s/ James M. Graves
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 1975, copies of the foregoing Notice of Appeal to the Supreme Court of the United States were mailed, postage prepaid, to

The Solicitor General
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Washington, D.C. 20530

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I FURTHER CERTIFY that all parties required to be served have been served.

/s/ James M. Graves
Boehl, Stopher, Graves & Deindoerfer
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One Riverfront Plaza
Louisville, Kentucky 40202
Attorney for Plaintiffs

# APPENDIX D

## TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

83 Stat. 742 (30 U.S.C. §901, *et seq.*), as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150.

### TITLE IV — BLACK LUNG BENEFITS

### Part A — General

**Sec. 401; 30 USC §901:**

Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease or who were totally disabled by this disease at the time of their deaths to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

**Sec. 402; 30 USC §902:**

For purposes of this title—

• • •

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

• • •

(f) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 423 (d) of Title 42.

• • •

**Part B — Claims for Benefits Filed on or Before December 31, 1973**

**Sec. 411; 30 USC §921:**

(a) The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any minor whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis.

(b) The Secretary shall by regulation prescribe standards for determining for purposes of subsection (a) of this section whether a miner is totally disabled due to pneumoconiosis and for determining whether the death of

a miner was due to pneumoconiosis. Regulations required by this subsection shall be promulgated and published in the Federal Register at the earliest practicable date after December 30, 1969, and in no event later than the end of the third month following December 1969. Final regulations required for implementation of any amendments to this subchapter shall be promulgated and published in the Federal Register at the earliest practicable date after the date of enactment of such amendments, and in no event later than the end of the fourth month following the month in which such amendments are enacted. Such regulations may be modified or additional regulations promulgated from time to time thereafter.

(c) For purposes of this section—

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his

death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be; and

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(d) Nothing in subsection (c) of this section shall be deemed to affect the applicability of subsection (a) of this section in the case of a claim where the presumptions provided for therein are inapplicable.

**Sec. 413; 30 USC §923:**

(a) Except as otherwise provided in section 924 of this title, no payment of benefits shall be made under this part

except pursuant to a claim filed therefor on or before December 31, 1973, in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe.

(b) In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 423 of Title 42, but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 421 of Title 42 shall be applicable. The provisions of sections 404, 405(a), (b), (d), (e), (f), (g), (h), (j), (k), and (l), 406, 407, and 408 of Title 42 shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister or dependent, as if benefits under this part were benefits under subchapter II of chapter 7 of Title 42.

(c) No claim for benefits under this section shall be considered unless the claimant has also filed a claim under the applicable State workmen's compensation law prior to or at the same time his claim was filed for benefits under this section; except that the foregoing provisions of this paragraph shall not apply in any case in which the filing of a claim under such law would clearly be futile because

the period within which such a claim may be filed thereunder has expired or because pneumoconiosis is not compensable under such law, or in any other situation in which, in the opinion of the Secretary, the filing of a claim would clearly be futile.

**Part C — Claims for Benefits After December 31, 1973**

**Sec. 421; 30 USC §931:**

(a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's compensation law which provides adequate coverage for pneumoconiosis they shall be entitled to claim benefits under this part.

* * *

**Sec. 422; 30 USC §932:**

(a) During any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927), as amended (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) shall (except as otherwise provided in this subsection and except as the Secretary shall by regulation otherwise provide), be applicable to each operator of coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems neces-

sary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

(b) During any such period each such operator shall be liable for and shall secure the payment of benefits, as provided in this section and section 933 of this title.

(c) Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary and the Secretary of Health, Education, and Welfare applicable under this section: *Provided,* That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise, at least in part, out of employment in a mine during the period when it was operated by such operator.

(d) Benefits payable under this section shall be paid on a monthly basis and, except as otherwise provided in this section, such payments shall be equal to the amounts specified in section 922(a) of this title.

(e) No payment of benefits shall be required under this section:

(1) except pursuant to a claim filed therefor in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe;

(2) for any period prior to January 1, 1974; or

(3) for any period after twelve years after December 30, 1969.

(f) (1) Any claim for benefits under this section shall be filed within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death.

(2) Any claim for benefits under this section in the case of a living miner filed on the basis of eligibility under section 921(c) (4) of this title, shall be filed within three

years from the date of last exposed employment in a coal mine or, in the case of death from a respiratory or pulmonary impairment for which benefits would be payable under section 921(c) (4) of this title, incurred as the result of employment in a coal mine, shall be filed within fifteen years from the date of last exposed employment in a coal mine.

(g) The amount of benefits payable under this section shall be reduced, on a monthly or other appropriate basis, by the amount of any compensation received under or pursuant to any Federal or State workmen's compensation law because of death or disability due to pneumoconiosis.

(h) The regulations of the Secretary of Health, Education, and Welfare promulgated under section 921 of this title shall also be applicable to claims under this section. The Secretary of Labor shall by regulation establish standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine or mines. The Secretary may also, by regulation, establish standards for apportioning liability for benefits under this subsection among more than one operator where such apportionment is appropriate.

(i) (1) During any period in which this section is applicable with respect to a coal mine an operator of such mine who, after December 30, 1969, acquired such mine or substantially all the assets thereof from a person (hereinafter referred to in this paragraph as a "prior operator") who was an operator of such mine on or after the operative date of this subchapter shall be liable for and shall, in accordance with section 933 of this title, secure the payment of all benefits which would have been payable by the prior operator under this section with respect to miners previously employed in such mine if the acquisition had not occurred and the prior operator had continued to operate such mine.

(2) Nothing in this subsection shall relieve any prior operator of any liability under this section.

**Sec. 430; 30 USC §940:**

The amendments made by the Black Lung Benefits Act of 1972 to part B of this subchapter shall, to the extent appropriate, also apply to this part: *Provided,* That for the purpose of determining the applicability of the presumption established by section 921(c) (4) of this title to claims filed under this part, no period of employment after June 30, 1971, shall be considered in determining whether a miner was employed at least fifteen years in one or more underground mines.

Supreme Court, U. S.
FILED
MAY 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-1316

# In the Supreme Court of the United States

OCTOBER TERM, 1974

---

TURNER ELKHORN MINING COMPANY, ET AL.,
APPELLANTS

*v.*

JOHN T. DUNLOP, SECRETARY OF LABOR, AND CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY*

---

## MOTION TO AFFIRM

---

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

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---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY*

---

## MOTION TO AFFIRM

---

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees hereby move to affirm paragraph 3 of the judgment of the district court.

### STATEMENT

The appellant coal mine operators (hereafter plaintiffs) have appealed from the portion of the judgment of the district court that sustained the constitutionality of most of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. (Supp. II) 901 *et seq.* In a cross-appeal, No. 74-1302, we have appealed from the district court's holding that two provisions of Title IV are unconstitutional.

We rely in this motion to affirm upon our jurisdictional statement in No. 74-1302 and our motion to affirm in

*National Independent Coal Operator's Association* v. *Brennan*, 419 U.S. 955, affirming 372 F. Supp. 16 (D.D.C.).[1]

## ARGUMENT

The questions presented in the jurisdictional statement are functionally identical to those presented in *National Independent Coal Operator's, supra*. In that case the district court upheld Title IV against similar contentions, also made by a group of mine operators. The jurisdictional statement in that case asserted, as does plaintiffs' jurisdictional statement here, that Title IV retroactively burdened transactions considered "closed" by the mine operators, arbitrarily compelled mine operators to compensate miners who may have been employed only a brief period, and established an assertedly "irrational and arbitrary" series of definitions and evidentiary presumptions. See *National Independent Coal Operator's* J.S., pp. 7-15. This Court summarily affirmed, thereby rejecting those contentions. The summary affirmance in *National Independent Coal Operator's* is dispositive of this case.

1. Plaintiffs contend that Part C of Title IV is unconstitutional because some ex-miners, who have not worked in the mines after the effective date of the Act, are entitled to receive compensation from their former employers. We addressed an identical contention at pages 9-12 of our motion to affirm in *National Independent Coal Operator's*, and we rely upon those arguments here. We argued that, under traditional concepts of tort law, an injury caused by events in the past does not "occur" until the disability becomes manifest. An injurer does not

[1]Plaintiffs have been furnished with copies of our motion to affirm in *National Independent Coal Operator's*.

escape liability merely because the consequences of the injury are delayed or concealed. Part C imposes liability only for injuries discovered or occurring after the date of its passage; liability for injury or death occurring earlier is borne by public funds. Part C therefore does not operate retrospectively, and is a permissible exercise of legislative power.

Plaintiffs contend (J.S. 16-21) that Part C is innovative and not as fair as other forms of compensation that might have been enacted. They apparently recognize, however, that such complaints ordinarily do not establish a flaw of constitutional magnitude, for they also assert that this legislation "should be subjected to a scrutiny more careful than that demanded in the case of constitutional challenges to [other] laws affecting economic interests * * *" (J.S. 14). There is no reason, however, for this Court to subject Part C to extraordinary scrutiny. As *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, recently reaffirmed, the Constitution does not authorize this Court to evaluate the wisdom of economic and social welfare legislation. The legislative choice must be upheld if "there is an evil at hand for correction, and * * * it might be thought that the particular legislative measure was a rational way to correct it" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488). See also *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421. So long as the statute is rational and creates no invidious discrimination, those adversely affected by it must seek relief from the legislature, not from the courts.

The approach taken by Congress in Part C meets these standards. It requires mine operators to recompense their employees, past and present, for occupational diseases caused by working conditions in their mines and becoming manifest after the effective date of the Act.

It was reasonable for Congress to conclude that the coal industry should bear part of the responsibility for redressing injuries arising out of employment in the mines. And it was equally reasonable for Congress, through the use of a workers' compensation plan, to place that responsibility upon operators in proportion to the extent of the injuries occurring in their mines. Although Congress might have imposed liability without regard to responsibility,[2] it is not irrational or unfair to impose liability relating more directly to the effects of work in the particular operator's mines. Under Part C liability is imposed upon an operator only if "a prior employment nexus is established" and "the claim is based on pneumoconiosis arising, at least in part, from such employment" (J.S. App. B, p. 5b). The district court therefore correctly concluded that the statute "manifest[s] a logical and rational basis for the assertion of liability" (*ibid.*). The Constitution requires no more.

2. Plaintiffs also contend (J.S. 21-24) that some of the evidentiary presumptions in Part C, and some of its definitions, are arbitrary, and that they should have been permitted to introduce in the district court evidence that

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[2]Plaintiffs concede (J.S. 16) that Congress constitutionally could create a program of compensation to miners for disability caused by employment long since terminated and finance that program by levying a tax on current mine operators. If such a program is permissible, it would amount to compelling all present operators to pay for injuries caused long ago, the very "flaw" that plaintiffs assail in Part C. We see no constitutional difference between financing compensation by a present tax on operators and financing compensation by a present workers' compensation program. The costs of either program would be approximately the same and fall on approximately the same operators. Indeed, it could be contended that a tax is less fair, because it compels recent entrants into the industry to make recompense for injuries caused by their predecessors; recent entrants would effectively subsidize firms that have been producing coal (and pneumoconiosis) for a longer period.

would demonstrate their asserted irrationality. As we pointed out in our motion to affirm in *National Independent Coal Operator's*, however, Congress had before it abundant evidence in support of the course it eventually chose. Plaintiffs in effect are seeking an opportunity to convince the district court that Congress should have chosen another, wiser course. But that is not an appropriate inquiry for the district court.[3] The evidence adduced before Congress provides the requisite support for the statute's rationality, and this Court so recognized in its summary affirmance in *National Independent Coal Operator's*.[4]

## CONCLUSION

For the foregoing reasons paragraph 3 of the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

MAY 1975.

---

[3]Plaintiffs rely upon cases such as *Leary* v. *United States*, 395 U.S. 6, to support their argument that the district court must entertain evidence directed to the rationality of Congress' choices (see J.S. 22-23). But *Leary* was a criminal case, and in order to support a verdict of guilt a presumption must be accurate in fact as well as rationally supportable. See *Barnes* v. *United States*, 412 U.S. 837; *Turner* v. *United States*, 396 U.S. 398. The legislature is permitted a much freer hand in drawing inferences and establishing classifications in economic regulatory legislation.

[4]Plaintiffs challenge Section 411(c)(1) of the Act, 30 U.S.C. (Supp. II) 921(c)(1), which was not directly addressed by the jurisdictional statement and the motion to affirm in *National Independent Coal Operator's*. The considerations governing the rationality of that subsection are identical to those relevant to other portions of Part C, however, and the district court properly concluded that "the medical testimony received by the Congress" (J.S. App. B, p. 9b) amply supports Congress' choice.

Supreme Court, U. S.
F I L E D
MAY 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1316

TURNER ELKHORN MINING COMPANY, ET. AL.,
*Appellants,*

v.

JOHN T. DUNLOP, SECRETARY OF LABOR AND
CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE,
*Appellees.*

**On Appeal from the United States District Court for the Eastern District of Kentucky**

## BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1316

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TURNER ELKHORN MINING COMPANY, ET. AL.,
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v.

JOHN T. DUNLOP, SECRETARY OF LABOR AND
CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE,
*Appellees.*

---

**On Appeal from the United States District Court for the Eastern District of Kentucky**

---

## BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

---

The Bituminous Coal Operators' Association Inc., respectfully files this brief *amicus curiae,* with the written consent of all parties (Appendix 1a-1b), pursuant to Rule 42 of the Rules of the Supreme Court.

## I

## INTEREST OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION

The Bituminous Coal Operators' Association, Inc. (hereinafter referred to as BCOA) is a voluntary nonprofit association of bituminous coal mine operators. It was established in 1952 out of an effort to bring a degree of stability to the labor-management relations chaos and the long and bitter strikes that had long characterized the coal industry. Since that time, BCOA has continued to exist for the purpose of negotiating periodic labor agreements with the United Mine Workers and aiding its members in interpreting these agreements and devising and strengthening mechanisms for bringing about industrial peace in the coal industry. BCOA also is the principal coal industry spokesman on matters involving health and safety under the Federal Coal Mine Health and Safety Act of 1969.

BCOA membership is open to any bituminous coal company that is signatory to the National Bituminous Coal Wage Agreement. Its membership includes both individual coal companies and state and local coal associations. The direct and indirect members of BCOA are located throughout the coal mining areas encompassing all of the coal producing states and collectively produce at least 65 percent of the bituminous coal produced in the United States.

BCOA, therefore, has a continuing interest in the implementation and enforcement of the Black Lung Benefits provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, (hereafter "the Act"), which is applicable to the mining operations of each of its members.

## II

## THE QUESTIONS ARE OF GREAT IMPORTANCE

This brief *amicus curiae* addresses itself to the magnitude of the impact of the black lung benefits program on the coal mining industry. It demonstrates, we submit, that the issues involved are of enormous importance to the coal industry in general and to the member companies of BCOA in particular and that probable jurisdiction should be noted.

### A. There Is a Lack of Clear Parameters for Black Lung Liability

From the outset, the problem in administering the unique compensation features of Title IV of the Act, which cast liability on present coal mine operators for conditions arising out of past employment relationships, has been the inability to define the beneficiary population. This lack of a clearly defined population makes it impossible for a coal mine operator to assess his potential liability and bears directly on the mine operator's cost of securing and his ability to secure his potential liability, through either private insurance contracts or self-insurance plans.

Employment in bituminous coal mines has declined from a high of 650,000 production workers in 1923 to 120,000 in 1970, when the Act became effective.[1] Since then, the number of employees has increased to approximately 140,000.[2] Thus, the number of former

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[1] Bureau of Labor Statistics, Department of Labor, *Wage Chronology-Bituminous Coal Mine Operators and United Mine Workers of America; October 1933—November 1974*, p. 1 (Bulletin 1799).

[2] U. S. Department of Interior, *Bureau of Mines Mineral Yearbook* (1972).

coal miners exceeds the current labor force in the coal industry by a factor of more than 4. There are currently 83,745 of these former miners on pension under the industry pension fund.

Apart from the grossly disproportionate number of former miners to active miners, the coal mining industry has yet another unique characteristic—it has the oldest labor force of any industry with the exception of the railroad industry.[3] The coal mine labor force has a substantial percentage of miners 45 years of age or older, most of whom have long work histories in the mines.

These factors make it impossible to determine the parameters of black lung liability. Of the 279,000 pre-1972 amendment claims which were allowed, 174,000 (30,000 more than the *entire* current work force) were filed by miners and the remainder by widows and other survivors.[4] An additional 60,000 claims are pending with the Department of Labor.[5]

Thus, the current potential liability includes the 60,000 pending claims, an unknown percentage of those active miners over the age of 45, and an unknown number of men no longer employed in the industry.

This inability to define the class or determine the approximate number of beneficiaries is reflected in the constant underestimation by government officials of the cost of the benefits program. The cost, originally

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[3] U.S. Department of Labor, *Monthly Labor Review* (March 1974) p. 29.

[4] *Id.* at 28.

[5] Statement of Carl E. Bagge, President, National Coal Association, before Subcommittee on Labor Standards, House Committee on Education and Labor, presented March 13, 1975.

estimated to be $3 billion over a 20 year period, will now reach almost $20 billion. The Social Security Administration currently is paying out benefits at an annual rate close to one billion dollars, which is almost 7 times the rate estimated originally![6]

The cost of the benefits program to individual coal mine operators is economically devastating. The present discounted value of each black lung claim has been actuarially estimated to be upwards of $56,000, plus an additional $12,000 representing the present discounted value of the accompanying medical benefits.[7] The insurance estimate now generally accepted in the industry is that the premium rate for federal black lung compensation coverage will cost approximately $25 per $100 of payroll,[8] and self-insurance plans, which must be approved by the Secretary of Labor, require a typical mine operator who employs 20 or more employees to post security with the Secretary in the amount of $175,000 plus approximately $75,000 per 100 employee-miners in excess of 100.[9]

**B. The Labor Force in the Coal Industry Would Be Rendered Relatively Immobile**

The unique feature of the black lung program, as administered, which casts full liability on the last em-

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[6] Statement of Steven Kurzman, Assistant Secretary, Department of Health, Education and Welfare before the Subcommittee on Labor Standards, House Committee on Education and Labor presented March 13, 1975.

[7] Affidavit of J. Huell Briscoe, actuary, submitted in support of Plaintiffs' Motion for Summary Judgment filed in District Court on February 15, 1974.

[8] Deposition of George Reall, January 16, 1974, filed in District Court.

[9] 20 C.F.R. 726.101 (b) (4).

ployer for respiratory ailments resulting from prior coal mine employment tends to make former miners not reemployable in the industry and to render the active labor force immobile.

The demand for increased coal production to meet the Nation's current and future energy needs is expected to result in a sharp increase in the size of the coal industry labor force. Normally, such employment opportunities would draw from the ranks of former, experienced miners. This would be particularly true today, in view of current high wage levels in the coal industry, dramatic improvements in mine health and safety and poor employment opportunities in other industries. However, employment of former coal miners could well become economically unfeasible, regardless of the extent of their mining experience, for the simple reason that their new employer may be purchasing a black lung benefits claim of a discounted value exceeding $68,000.

Similarly, the Black Lung Act tends to inhibit the mobility of the current labor force. In the past, several industry characteristics have contributed to a high level of mobility among coal miners. One is the nature of coal mining itself, which produces an exhaustable product. As a coal mine begins to be worked out, the miners move on to newly opened or existing mines, frequently operated by another mining company. Another characteristic which contributes to the mobility of the work force is the geographical clustering of large numbers of coal mines. Unlike industries which have great latitude in locating their manufacturing facilities, the mining industry locates in the coal fields of a handful of states. Thus, a wide choice of employment is available to most coal miners, within driving distance of their homes.

Active miners will thus be "locked in" to their current employer, for a new employer (whose operations presently must meet respirable dust standards which medical authorities agree should eliminate the risk of contracting pneumoconiosis) will not be likely to employ an experienced miner who represents a potential black lung liability in excess of $100,000.

### C. The Mine Operator Will Bear the Cost of Providing Duplicative Benefits

Under the industry's current labor agreement with the United Mine Workers of America—the National Bituminous Coal Wage Agreement of 1974—already retired coal miners who are receiving state or federal black lung benefits receive a monthly pension of $200.00 (increasing to $225.00 in 1976) and are entitled to a "health services card" which provides all-inclusive medical care to the miner, his wife and dependents. Fund records indicate that 75 percent of coal mine pensioners are receiving black lung benefits. Coal miners who retire in the future will receive pensions up to over $500.00.

These contract benefits, paid from employer-financed pension and welfare funds, are costly to the individual mine operator. The current employer contribution is $.74 per ton of coal produced plus $.90 per hour of work. That contribution increases in the final year of the 3-year contract to $.82 per ton and $1.54 per hour, or the equivalent of $1.60 per ton.

The federal black lung benefits program, obligating the last employer to pay the total cost of compensation and medical benefits, is even more costly to the individual mine operator. Such claims, actuarially estimated to have a present discounted value in excess of $68,000,

will cost the last employer approximately $25.00 in insurance premiums for each $100.00 of payroll. These costs, which do not include the cost of insuring or securing claims under state black lung programs, must, of course, be reflected in current prices despite the fact that they represent a past liability which previously did not exist and compensate for a respiratory condition which was not until recently medically attributable to the industry.

### D. Mine Operator Efforts To Comply with Mandatory Health and Safety Standards Will Be Neutralized

Pneumoconiosis was recognized as a disease by medical authorities in this country only since the mid-1950's and it was not until 1970 that mandatory programs for the control of respirable coal dust became effective and the disease became compensable.[10]

Nevertheless, the Act purports to impose on current mine operators who have been and are in full compliance with federal health and safety standards *total* liability for respiratory ailments contracted during prior employment relationships with other employers when the disease was not recognized and means were not developed for reducing or eliminating its incidence.

Medical experts are in agreement that the Act's mandatory health standard requiring operators to maintain respirable coal dust levels not greater than 2 milligrams per cubic meter of air should result in the elimination of pneumoconiosis as an occupational disease

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[10] Remarks of Senator Javits of New York, House Committee on Education and Labor, *Legislative History/Federal Coal Mine Health and Safety Act*, p. 339.

for coal miners entering the industry in the 1970's.[11] Virtually all mines have met this important dust level requirement, with enormous capital expenditures and heavy commitments of manpower and technology.

It does not seem entirely fair that the Act simultaneously imposes on the operators of the more than 2,000 underground and surface bituminous mines a liability which previously did not exist, for a disease which previously was not recognized and for the prevention of which no methods previously had been developed or mandated.

It is obviously unfair that the Act which mandates dust levels medically believed to eliminate the risk of pneumoconiosis simultaneously creates operator liabilities based on presumptions as to disability that are not allowed to be disproved.

It is thus not surprising that government medical authorities have suggested that "in the long run such a philosophy would compromise not only the dust control program, but also the health of U.S. Miners.[12]

## III

## CONCLUSION

The foregoing, we submit, amply demonstrates the magnitude of the impact of the federal black lung benefits program on the coal mining industry and the

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[11] Statement of Andre Maisonpierre, Vice President, American Mutual Insurance Alliance before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 25, 1975.

[12] Statement of Dr. W.K.C. Morgan, former Director, Appalachian Laboratory for Occupational Respiratory Disease before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 27, 1975; p. 5.

substantiality of the issues raised in this case and further supports the position of Appellants *Turner Elkhorn Mining Company et al.* that probable jurisdiction should be noted.

Respectfully submitted,

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## APPENDIX

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WASHINGTON, D. C. 20530

April 4, 1975

Guy Farmer, Esq.
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1120 Connecticut Avenue, N.W.
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Re: John T. Dunlop, Secretary of Labor, et al. v. Turner Elkhorn Mining Company, et al.

Dear Mr. Farmer:

As requested in your letter of March 31, I hereby consent to your filing a brief amicus curiae in the above case on behalf of the Bituminous Coal Operators Association.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
*Solicitor General*

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Guy Farmer, Esq.
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Re: Turner Elkhorn Mining Co. v. Brennan

Dear Mr. Farmer:

On behalf of the plaintiffs in the above captioned litigation, I consent to the filing of a brief *amicus curiae* on appeal to the United States Supreme Court by the Bituminous Coal Operators Association.

Very truly yours,

/s/ R. R. MCMAHAN
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*Counsel for plaintiffs*
*Turner Elkhorn Mining Co.*
*et al.*

Supreme Court, U. S.
FILED
MAY 27 1975

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

## No. 74-1316

**TURNER ELKHORN MINING COMPANY, ET AL.,**

*Appellants,*

vs.

**JOHN T. DUNLOP, SECRETARY OF LABOR and CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,**

*Appellees.*

**On Appeal From The United States District Court For The Eastern District Of Kentucky**

## RESPONSE TO MOTION TO AFFIRM

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# Supreme Court of the United States

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*Appellees.*

**On Appeal From The United States District Court For The Eastern District Of Kentucky**

## RESPONSE TO MOTION TO AFFIRM

1. Appellants submit, for the reasons stated at pp. 8-11 of their motion to affirm in No. 74-1302, *Dunlop* v. *Turner Elkhorn Mining Co.*, that this Court's summary affirmance of the decision of the District Court for the District of Columbia in *National Independent Coal Operator's Association* v. *Brennan*, 372 F.Supp. 16, *aff'd*, 419 U.S. 955 (hereafter the *NICOA* case), affords no basis for the summary disposition sought by the government in the instant case. As appellants have shown in No. 74-1302, the posture in which the *NICOA* case arose and was disposed of by

the District Court and this Court render its precedential value suspect. That decision is additionally suspect because the motion to affirm filed by the Solicitor General in *NICOA*, and upon which he now relies to support his motion in the instant case, seriously misrepresents the obligations imposed upon mine operators by the legislation in question.

In its *NICOA* motion to affirm (pp. 8-9), the government represented to this Court that

> The Act contains a statute of limitations. A claim must be filed "within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death." Section 422(f)(1), 30 U.S.C. (Supp. II) 932 (f)(1) [footnote omitted]. Because employer liability can arise only with respect to claims filed on or after July 1, 1973, the Act does not create employer liability where total disability was discovered or death occurred prior to July 1, 1970. The 1969 Act was enacted six months earlier, on December 30, 1969, and there is therefore no possibility of an authorized claim involving total disability discovered, or death which occurred, prior to the date of original enactment.

What the government did not tell this Court is that it consistently has taken the position that claims filed during the period June 30, 1973 to December 31, 1973 are not subject to the Act's statute of limitations. Nearly 18,000 of such claims had been filed by the end of November, 1973,* and no doubt many more were filed before this six

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* Deposition of Nancy Snyder, Director of the Division of Coal Mine Workers' Compensation, Department of Labor, taken on December 4, 1973, and filed of record in this case in the District Court, p. 57. Appellants are prepared to show that some 80% of the claimants tentatively determined by the Department of Labor to be eligible for benefits payable by Appellants were born during the period 1880 to 1912, and that the vast majority of these claimants left mining employment in the 1940's and 1950's.

month period expired. The motion to affirm in the *NICOA* case also inaccurately portrays the economic burdens placed on mine operators by the Act. In its *NICOA* motion the government told this Court that operator benefits liability would terminate in 1981. (*NICOA* motion to affirm p. 6). The government did not tell this Court that the Department of Labor consistently has taken the position that operators are liable for payment of life-time benefits to eligible claimants, and that the Department requires operators, or their insurance carriers, to establish and maintain security reserves in connection with such benefits in amounts sufficient to secure payment for lifetime, not just until 1981.

2. The government's assertion in the instant motion (pp. 2-3) that the Act reaches only cases of disability due to occupational disease which becomes "manifest" after the effective date of Act, and that liability is imposed on operators only ". . . for injuries discovered or occurring after the date of its passage", amount to little more than a catch-22 argument. In this law Congress has, by legislative *fiat*, invented a disease unknown to medicine, given it the name of a true, medically recognized, disease, and defined it as disabling in circumstances where it is not disabling. Congress achieved this end through the use of arbitrary definitions and presumptions that have no valid foundation in medicine, and that compel diagnosis of occupational disease and disability where it does not exist in reality. Of course such cases of "disease" and "disability" could only be "discovered" after passage of the law and through application of its diagnostic parameters. If, prior to passage of the law, these cases had been presented to medical experts unfettered by such artificial definitions and presumptions, they would not have been so diagnosed, just as they would not be so diagnosed today if viewed

outside the context of an application for benefits under the Act. As it stands, the legislation in question is only slightly less arbitrary than it would be had Congress merely decreed that it is to be conclusively presumed that all retired mine workers who have worked in mining for a given number of years are totally disabled by occupational disease, and that their former employers must pay them a monthly stipend. Appellants believe that the Constitution protects them from such legislative arbitrariness, no matter how elaborately it may be fitted out in the familiar language and forms of genuine workmen's compensation legislation.

## CONCLUSION

For the foregoing reasons, the motion of the Appellees to affirm Paragraph 3 of the judgment of the District Court should be denied.

Respectfully submitted,

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May, 1975

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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v.

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CASPAR W. WEINBERGER, SECRETARY
OF HEALTH, EDUCATION AND WELFARE,
*Appellees.*

**On Appeal from the United States District Court for the Eastern District of Kentucky**

## BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1974

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TURNER ELKHORN MINING COMPANY, ET AL.,
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*Appellees.*

---

**On Appeal from the United States District Court for the Eastern District of Kentucky**

---

## BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., AMICUS CURIAE

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The Bituminous Coal Operators' Association, Inc., respectfully files this brief *amicus curiae,* with the written consent of all parties, pursuant to Rule 42 of the Rules of the Supreme Court.

## I

## QUESTION PRESENTED

This brief will address only the following issue, while supporting appellants on the other issues present in the case:

Whether the black lung benefits provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, are constitutionally permissible under the Fifth Amendment, insofar as they impose upon individual coal mine operators the obligation to compensate ex-coal miners for occupational disabilities arising out of employment relationships which had terminated prior to enactment of the legislation.

## II

## STATEMENT OF THE CASE

BCOA adopts the statement of the case as set forth in the brief submitted by Turner Elkhorn Mining Company, *et al.*, Appellants at No. 74-1316. The following will supplement Appellants' statement and briefly restate certain facts for the convenience of the Court in its study of this brief *amicus curiae.*

### A. The Statutory Scheme

Pneumoconiosis, which legislatively is defined as "a chronic dust disease of the lung arising out of employment in a coal mine",[1] was not recognized by medical authorities in this country as a disease until the mid-1950's. In commenting upon the legislation, Senator Javis reviewed the history of the disease:

> "I emphasize, Mr. President, that the entire Nation shares the responsibility for this tragic

[1] Sec. 402(b), Federal Coal Mine Health and Safety Act of 1970, as amended, 30 U.S.C. 902(b).

> situation: witness after witness who testified on this bill stressed America's complete insensitivity to the problem of black lung until very recently—it was not until the mid-1950's that black lung was recognized by responsible medical authorities as a disease. Britain, on the other hand, began to recognize the disease in 1934, and it became compensable in 1943. In the United States, until last year, only three States recognized black lung as a compensable disease; in other States the only way miners could receive compensation is if they could convince examining boards they had silicosis, which usually was not possible."[2]

It was not until 1970 that Congress first enacted mandatory standards for the measurement, control and ultimate reduction of respirable dust levels in underground coal mines. Title II of the Act was the first federal legislation to provide for periodic sampling of the mine atmosphere, Sec. 202(a), and the ultimate reduction in the average concentration of respirable dust in the mine atmosphere to which each miner in the active workings is exposed to 2.0 milligrams or less of respirable dust per cubic meter of air, Sec. 202(b)(2). This current level, which medical authorities believe should prevent new incidences of pneumoconiosis and deter further development of disease in existing cases,[3] has been achieved in virtually all coal mines, through enormous capital expenditures and heavy commitments of manpower and technology.

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[2] Legislative History/Federal Coal Mine Health and Safety Act, p. 339.

[3] Statement of Andre Maisonpierre, Vice President, American Mutual Insurance Alliance before Subcommittee on Labor Standards, House Committee on Education and Labor, presented February 25, 1975.

Similarly, it was not until 1970 that Congress first established a program to compensate miners totally disabled by pneumoconiosis and dependents of miners whose death was due to pneumoconiosis. The program consists of two parts, Part B (Sec. 411-415) and Part C (Sec. 421-431). The former, Part B, is a federally-financed program which provides benefits on the basis of claims filed on or before December 31, 1973. The latter, Part C, creates a program under which individual coal mine operators are responsible for the payment of benefits, beginning on or after January 1, 1974, on the basis of claims filed on or after July 1, 1973.

Claimants under each program are aided in their proof by certain legislated presumptions as to existence of the disease, its causal relation to mine employment, its totally disabling effect and its causal relation to the death of miners, all designed to make it much easier for a claimant to perfect his claim:

1. If a miner with pneumoconiosis was employed for ten years in coal mines, it will be rebuttably presumed that the disease arose out of such employment. Sec. 412(a)(1).

2. If a deceased miner was employed for ten years in coal mines and died from a respirable disease, it will be rebuttably presumed that his death was caused by pneumoconiosis. Sec. 412(a)(2).

3. If a miner is or has suffered from a chronic dust disease of the lung which meets certain specified medical criteria, it will be conclusively presumed that he is totally disabled due to pneumoconiosis or that he died of it or was totally disabled by it when he died. Sec. 412(a)(3).

> 4. If a miner with a totally disabling respiratory or pulmonary impairment was employed for fifteen years in underground mines (or surface mines under similar conditions), it will be rebuttably presumed that he is totally disabled by pneumoconiosis, or that he died of it or was totally disabled by it when he died. Sec. 412(a)(4).

Part C, the operator-funded program, is not limited to miners now actively employed in mining activities who may become eligible subsequent to January 1, 1974. On the contrary, claimants may be eligible for benefits even if the claim is based on death or disability which occurred *before* enactment of the law and even if the miner had ceased to be employed in the industry prior to 1970.

### B. Administration of Benefits Program

Over 280,000 Part B claims have been allowed by the Social Security Administration. Of these, 174,000 (20,000 more than the entire current work force in the coal industry) were filed by coal miners and the remainder by widows and other dependents.[4]

Over 51,000 Part C claims were filed through December 31, 1974. Of these, 45,519 were received from miners and the remainder from dependents.[5] Initial determinations have thus far been made by the Depart-

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[4] U.S. Department of Labor, *Monthly Labor Review* (March, 1974) p. 28-29.

[5] First Annual Report of Department of Labor as to administration of Black Lung Program, dated May 30, 1974.

ment of Labor in 34.5 percent (17,688) of the filings and of those on which initial determinations were made, 21.6 percent (3,817) were tentatively approved as entitled to benefits. Of those approved involving alleged liability of coal mine operators,[6] 97 percent are being contested by the particular coal operator upon whom the Government has attempted to place the burden of the entire payments.

As of July 20, 1975, less than twelve of the contested claims have been heard and decided on their merits by an administrative law judge. Only three involved claimants who were employed at a coal mine subsequent to enactment of the law. The remainder had left the industry prior to 1970.

:Gordon Abney, Sr. (Docket No. 75-BLA-18); age 80; last employed as miner in 1957 when leg was amputated; compensation awarded June 13, 1975.

:Dominic C. Brisko (Docket No. 75-BLA-21); age 65; last employed as miner in 1954; compensation awarded April 11, 1975.

:James Fields (Docket No. 75-BLA-9); age 55; last employed underground in coal mine in 1955; employed as coal truck driver 1955-1966; compensation awarded April 9, 1975.

:Abel Hamilton (Docket No. 75-BLA-27); age 45; last employed in coal mine in 1957; other non-coal mine employment to 1971; compensation awarded July 9, 1975.

:Reed Hart (Docket No. 75-BLA-22); age 23; last employed at coal mine as surveyor in 1970; other

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[6] Where no financially responsible employer exists, benefits are paid by the Department of Labor.

non-coal mine employment to 1973; compensation awarded May 14, 1975.

:Martin Hogarty (Docket No. 75-BLA-23); age 73; last employed at surface mine in 1952; other non-coal mine employment to 1960; compensation awarded May 16, 1975.

:Jack Hoffman (Docket No. 75-BLA-15); last employed at surface mine in 1973; compensation awarded June 3, 1975.

:Nathaniel Hunter (Docket No. 75-BLA-48); age 89; last employed in foundry on surface at coal mine in 1959; compensation awarded May 15, 1975.

:Henning Clang (Docket No. 75-BLA-47); age 63; last employed at coal mine in 1973; compensation awarded June 20, 1975.

:Boyd Shaffer (Docket No. 75-BLA-11); age 67; last employed at coal mine in 1951; other non-coal mine employment to 1973; compensation awarded 1975.

:Monroe Wallen (Docket No. 75-BLA-24); age 64; last employed at coal mine in 1953; other non-coal mine employment to 1973; compensation awarded May 26, 1975.

### C. Coal Mining Industry

The Act defines "coal mine" as:

> ". . . an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or methods and the work of preparing the coal so extracted, and includes custom coal preparation facilities," Sec. 3(h); 30 U.S.C. 802(h).

The term "work of preparing the coal" is defined as:

> "... the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." Sec. 3(i); 30 U.S.C. 802(i).

Included within these broad definitions are more than 4,500 underground and surface coal mines, producing from 20 tons to 30,000 tons per day of bituminous, anthracite and lignite coal with from one to 960 employees, and coal preparation plants, many of which are located off the mine property.

Historically, several industry characteristics have resulted in a high level of mobility among coal miners. One is the nature of coal mining itself, which produces an exhaustable product. As a coal mine begins to be worked out, the miners move on to newly opened or existing mines, frequently operated by another mining company. Another characteristic which contributes to the mobility of the work force is the geographical clustering of large numbers of coal mines. Unlike industries which have great latitude in locating their manufacturing facilities, the mining industry locates where coal is found to exist in mineable quantities and quality in the coal fields in a relatively few states. Thus, a wide choice of employment at different mines and companies is available to most coal miners, within driving distance of their homes.

Employment in coal mines had declined from a high of 650,000 workers in 1923 to 120,000 in 1970, when the Act became effective.[7] Since then, the number of em-

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[7] Bureau of Labor Statistics, Department of Labor, Wage Chronology-Bituminous Coal Mine Operators and United Mine Workers of America; October 1933—November 1974, p. 1 (Bulletin 1799).

ployees had increased to more than 150,000.[8] Thus, even without considering work force turnover, the number of former miners exceeds by a multiple of four the current work force in the coal industry. There are currently more than 83,000 of these former miners on pension under the industry pension fund.

Apart from the grossly disproportionate number of former miners, the coal mining industry has yet another unique characteristic—it has the oldest labor force of any industry with the exception of the railroad industry.[9] The coal mine labor force has a substantial percentage of miners 45 years of age or older, most of whom have long work histories in the mines.

Of the current labor force in the coal industry of more than 150,000, more than 60,000 are employed at surface mines or at surface facilities which serve underground coal mines. Surface employees are exposed to considerably lower levels of respirable coal dust and lower incidences of pneumoconiosis, a fact which is reflected in the Department of Interior's frequency of sampling requirements, 30 C.F.R. Sections 70.220, 70.250, 71.107 and 71.108.

Of the approximately 90,000 miners who are employed underground at underground mines, almost half are involved in non-production activities, such as extending haulage tracks, belts, trolley wire and water lines on haulage roads; supporting roof on haulage roads; construction of stoppings (permanent partitions); repair and maintenance of equipment; and

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[8] U.S. Department of Interior, Bureau of Mines Mineral Yearbook (1972); monthly statistical reports, Dept. of Interior.

[9] U.S. Department of Labor, *Monthly Labor Review* (March, 1974) p. 29.

supply and haulage of equipment and material. These employees, like surface employees, are exposed to considerably lower levels of respirable coal dust than those working at the mine face extracting the coal.

The black lung benefits provisions of the Act, however, draw no distinction between surface and underground employees or production and non-production employees. Thus the Act, which defines "miner" as "any individual who is or was employed in a coal mine," Sec. 402(d), 30 U.S.C. 902(d), permits any former or present coal mine employee to assert a claim and affords him the benefit of the statutory presumptions, regardless of the levels of the respirable coal dust to which he may have been exposed.

## III

## ARGUMENT

### The Black Lung Benefits Program Insofar as It Bases Liability of Individual Coal Mining Companies on Employment Relationships Which Terminated Before Enactment of the Law, on Employment Conditions Which No Longer Exist and on a Disease Not Then Recognized Is Constitutionally Defective

The Black Lung benefits program, as this brief *amicus curiae* will demonstrate, is a classic example of retroactive legislation which arbitrarily creates new obligations based on preenactment transactions having no current or continuing effect. As such, it is violative of the Due Process Clause of the Fifth Amendment.

The Part C program incorporates a number of important features which collectively taint its validity.

> : it renders eligible for benefits all persons (and also a range of widows or dependents of such persons) who were employed in the industry at any time in the past. In an industry currently

employing approximately 150,000 persons, there are more than half a million former employees. Seven of the 11 claims already adjudicated by the Labor Department involve claimants who left the industry in the 1950's.

: it provides benefits to individuals who are retired (and currently receiving pensions under the industry's pension program), or were discharged for cause, or quit to accept gainful employment in other industries. Cf. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935). Of the adjudicated claims, one involved a miner who was disabled in 1957 following amputation of a leg; another quit employment as a miner in 1951, but worked in other industries for another 22 years; another left the coal industry in 1953, and worked in other industries until 1973; and another quit mining in 1957, but was employed in other industries until 1971.

: it establishes presumptions in aid of proof of eligibility, without regard to whether claimant was employed on the surface or underground at a coal mine, or in a production or non-production capacity, or was exposed to harmful levels of respirable coal dust. Of the 11 adjudicated cases, four involve claimants who worked on the surface in non-coal producing capacities, which are recognized by Interior Department as involving considerably lower levels of respirable coal dust.

: it imposes liability on the coal mining company which last employed the claimant without regard to his length of service with that company as compared to other companies, or whether the last place of employment was a surface or underground mine, or whether claimant otherwise was exposed to harmful levels of respirable dust. Thus, for example, a coal mining company which employed a claimant at a surface mine in 1968 and 1969 would be liable for the total compensation claim based

on claimant's exposure to high levels of respirable coal dust for many years previously at underground mines of other companies.

: it imposes total liability on individual coal mining companies, rather than providing for compensation under a program funded by the industry. Thus, black lung claims based on past employment with a company which had been engaged in mining operations on a much larger scale necessarily would have to be financed by that Company out of current, albeit reduced, production.

: it imposes liability for compensation without having first enacted legislative measures determining levels of respirable coal dust which would not be conducive to the incidence of pneumoconiosis. Equally important, coal prices might have been adjusted in accordance with sound accounting principles to reflect the then present value of such claims had they been reasonably anticipated.

: it imposes present liability based on a respiratory condition which was not recognized as an occupational disease in this country until the mid-50's and on mine conditions which were not made the subject of health standards until 1970. It was not until 1970 that coal mining companies were required to sample and take measures to reduce respirable coal dust levels in underground coal mines.

These retroactive characteristics of the black lung program alone make it perhaps unique among workmen's compensation programs in this country and render it constitutionally defective. Additionally, the economic imbalance which it creates among competing coal producers by the discriminatory standards for imposing liability on an individual coal company is additional evidence that this aspect of the program does not pass constitutional scrutiny.

As pointed out by Appellants Turner Elkhorn, the underlying philosophy of industrial compensation is that the economic losses of the worker are a part of the cost of production and are reflected in the price of the product. But by imposing unpredictable retroactive economic burdens on the employer, the philosophy is eroded and the mine owner has no way to recoup these costs.

The black lung benefits program, insofar as it applies *prospectively* to occupational disabilities suffered by workers in the employ of a coal mining company on or after enactment of the law, incorporates more traditional workmen's compensation concepts. Employers have the opportunity to take appropriate safety measures to reduce respirable dust levels in the working place, to monitor the physical condition of his employees, to transfer those of his employees with some evidence of a respiratory disfunction to less-dusty or even dust-free occupations, and to screen out job applicants with existing respiratory or pulmonary conditions. In short, each company subject to the program is in a position prospectively only to control production costs—and thus improve his competitive position in the industry—by maintaining a safe and healthful working environment for his employees.

These economic principles are thrown into disarray, however, by several features of the law including the *retroactive* aspect of the black lung program. In this regard employers have no control over the cost of current and future production, insofar as a part of those costs are based on past transactions which have no continuing effect. Current production costs and, hence, the employer's current competitive position in the market bear no relation to the employer's current working con-

ditions or to the size of the current work force. The employer whose coal mine meets—and even exceeds—federal respirable coal dust standards and whose work force is free from evidence of pneumoconiosis (as evidenced by results of the mandatory x-rays) nevertheless is competitively disadvantaged by reason of his exposure to claims from former employees whose employment has long since been terminated. A typical example illustrates the point:

> Company A, engaged in the production of coal for 40 years, has a current work force of 500 employees and produces 1 million tons per year. More than 5,000 individuals have been employed by the Company at one time or another over the years prior to 1970. Company B, engaged in the production of coal since only 1970, also produces 1 million tons of coal per annum with a work force of 500. Company A is faced with a potential claims liability grossly disproportionate to his current work force and current ability to meet these many obligations, since the number of claimants for which he is made responsible easily could exceed the number of present employees and exceed his ability to maintain a competitive operation. Company B, unburdened by this potential liability, except with reference to his current work force, has the distinct competitive advantage.

When one considers that the Part C program is not industry-funded, but rather is funded by individual employer-operators, it becomes apparent, we submit, that this legislation, insofar as it is based on employment relationships terminated prior to enactment of the law, results in such arbitrary discrimination among competing coal mining companies otherwise similarly situated as to render it constitutionally invalid.

Finally, the various legislative assumptions which make it virtually impossible to defend against black lung claims vastly increase the financial burden and makes the uneven competitive effect more pronounced.

Respectfully submitted,

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